Trujillo v. Apple Computer, Inc. et al Doc. 125

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSE TRUJILLO, individually and on behalf of all others similarly situated, Plaintiff, v. APPLE COMPUTER, INC., a California corporation and AT&T MOBILITY LLC, a Georgia corporation, Defendants.	CASE NO.: 07-CV-04946 Judge Kennelly

DEFENDANT APPLE INC.'S REPLY TO PLAINTIFF'S RESPONSE TO ITS RULE 56.1 STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Pursuant to Local Rule 56.1(a), Defendant Apple Inc. ("Apple") submits the following Reply to Plaintiff's Response to its Statement of Undisputed Material Facts in support of its Motion for Summary Judgment.

Parties, Jurisdiction, and Venue

1. Plaintiff Jose Trujillo ("Plaintiff") is an individual who resides in Melrose Park, Illinois. (Compl. ¶ 1.)

PLAINTIFF'S RESPONSE: Plaintiff admits the statements in Paragraph No. 1.

2. Defendant Apple Inc. (f/k/a Apple Computer, Inc.) is a California corporation with its corporate headquarters located in Cupertino, California. (Compl. ¶ 2; Defendant's Answer to Plaintiff's Complaint ("Answer") ¶ 2.)

PLAINTIFF'S RESPONSE: Plaintiff admits the statements in Paragraph No. 2.

3. Subject matter jurisdiction exists over this action pursuant to diversity jurisdiction as set forth in 28 U.S.C. § 1332, as amended by the Class Action Fairness Act of 2005. (Compl. ¶ 4.)

PLAINTIFF'S RESPONSE: Plaintiff admits the statements in Paragraph No. 3.

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4. Venue lies in this District, as Plaintiff alleges that he purchased his iPhone from an Apple retail store located in OakBrook, Illinois. (Compl. ¶ 8.)

PLAINTIFF'S RESPONSE: Plaintiff admits the statements in Paragraph No. 4.

Undisputed Material Facts

A. The iPhone Launch on June 29, 2007

5. Apple began selling the iPhone on June 29, 2007. (Declaration of Douglas Vincent in Support of Apple's Motion for Summary Judgment ("Vincent Decl.") ¶ 3.)

PLAINTIFF'S RESPONSE: Paragraph 5 of Vincent's Declaration is as stated in Paragraph 5 above, however, there are no facts in Vincent's Declaration to support what time the stated sale began.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

B. The iPhone Feature Label

6. Each iPhone is sold in a box on the outside of which a feature label is affixed. (Declaration of Peggy Jensen in Support of Apple's Motion for Summary Judgment ("Jensen Decl.") ¶ 2.)

PLAINTIFF'S RESPONSE: Paragraph 2 of Jensen's Declaration is as stated in Paragraph 6 above, however, Plaintiff states that the term "feature label" is unexplained, vague and ambiguous. Plaintiff further states that the statement in Paragraph 6 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

7. The feature label affixed to the iPhone box states:

> Battery has limited recharge cycles and may eventually need to be replaced by Apple service provider. Battery life and charge cycles vary by use and settings. See www.apple.com/batteries.

(Jensen Decl. ¶ 3, Ex. A.)

PLAINTIFF'S RESPONSE: Paragraph 3 of Jensen's Declaration is as stated in Paragraph 7 above, however, Plaintiff further states that "feature label" is unexplained, vague and ambiguous.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

8. The feature label for the iPhone has not changed since the product first went on sale on June 29, 2007. (Jensen Decl. ¶ 4.)

PLAINTIFF'S RESPONSE: Paragraph 4 of the Jensen Declaration is as stated in Paragraph 8 above, however, Plaintiff states that the term "feature label" is ambiguous, vague and unexplained. Plaintiff further states that the statement in Paragraph 8 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

C. The iPhone In-Box Guide and User's Guide

9. Included within each iPhone box is a paper copy of the "Important Product Information Guide" for iPhone. (Jensen Decl. ¶ 5.)

PLAINTIFF'S RESPONSE: Paragraph 5 of the Jensen Declaration is as stated in Paragraph 9 above. Plaintiff further states that the statement in Paragraph 9 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

10. The Important Product Information Guide for the iPhone states:

> Never attempt to repair or modify iPhone yourself. iPhone does not contain any user-serviceable parts, except for the SIM card and SIM tray . . . The rechargeable battery in iPhone should be replaced only by an Apple Authorized Service Provider. For more information about batteries, go to www.apple.com/batteries.

(Jensen Decl. ¶ 5, Declaration of Carol Jinks in Support of Apple's Motion for Summary Judgment ("Jinks Decl.") ¶ 3, Ex. A.)

PLAINTIFF'S RESPONSE: Plaintiff denies that Paragraph 10 above is a full and accurate recollection of the text included in the Important Product Information Guide.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

11. The Important Product Information Guide for iPhone has contained this language at all times since the iPhone first went on sale on June 29, 2007. (Jensen Decl. ¶ 6; Jinks Decl. ¶ 4.)

PLAINTIFF'S RESPONSE: Paragraphs 4 and 6 of the Jinks Declaration is as stated in Paragraph 11 above. Plaintiff states that the term "this language" is ambiguous, vague and unexplained. Plaintiff further states that the statement in Paragraph 11 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

12. The Important Product Information Guide is also available online on Apple's website at http://www.apple.com/support/manuals/iphone. (Jinks Decl. ¶ 2.)

PLAINTIFF'S RESPONSE: Paragraph 2 of the Jinks Declaration is as stated in Paragraph 12 above. Plaintiff further states that the term "is available online" is ambiguous, vague and unexplained as it fails to state the dates/times that Defendant purports such information was available online. Plaintiff further states that the statement in Paragraph 12 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

13. The Important Product Information Guide was uploaded and accessible to the public on Apple's website from June 29, 2007 to the present. (Jinks Decl. ¶ 2.)

PLAINTIFF'S RESPONSE: Paragraph 2 of the Jinks Declaration is as stated in Paragraph 13 above. Plaintiff states that the term "Apple's website" is ambiguous, vague and unexplained, because it fails to establish the website address and/or internet protocol address at which the information was purportedly available. Plaintiff further states that the statement in Paragraph 13 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

14. Apple created an iPhone User's Guide which can be found on Apple's website at http://www.apple.com/support/manuals/iphone. (Jinks Decl. ¶ 5.)

PLAINTIFF'S RESPONSE: Paragraph 5 of the Jinks Declaration is as stated in Paragraph 14 above. Plaintiff states that the term "can be found" is ambiguous, vague and unexplained as it fails to state the dates/times that Defendant purports such information was available on the Apple website. Plaintiff further states that the statement in Paragraph 14 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

15. The iPhone User's Guide was uploaded and accessible to the public on Apple's website from June 29, 2007 to the present. (Jinks Decl. ¶ 5.)

PLAINTIFF'S RESPONSE: Paragraph 5 of the Jinks Declaration is as stated in Paragraph 15 above. Plaintiff further states that the term "accessible" is ambiguous, vague and unexplained, as is the term "Apple's website" as they fail to establish the website address and/or internet protocol address at which the information was purportedly available. Plaintiff further states that the statement in Paragraph 15 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

16. In "Chapter 2: Basics," under the heading "Charging the Battery" on page 27, the iPhone User's Guide states:

> Rechargeable batteries have a limited number of charge cycles and may eventually need to be replaced. The iPhone battery is not user replaceable; it can only be replaced by an authorized service provider. For more information, go to: www.apple.com/batteries.

(Jinks Decl. ¶ 6, Ex. B.)

PLAINTIFF'S RESPONSE: Plaintiff denies that Paragraph 16 above is a full and accurate disclosure of the text included in "Chapter 2: Basics," under the heading "Charging the Battery" on page 27 of the iPhone User's Guide.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

17. In "Appendix A: Safety and Handling," under the heading "Repairing iPhone" on page 112, the iPhone User's Guide states:

> Never attempt to repair or modify iPhone yourself. iPhone does not contain any user-serviceable parts, except for the SIM card and SIM tray . . . The rechargeable battery in iPhone should be replaced only by an Apple Authorized Service Provider. For more information about batteries, go to www.apple.com/batteries.

(Jinks Decl. ¶ 7, Ex. B.)

PLAINTIFF'S RESPONSE: Plaintiff denies that Paragraph 17 above is a full and accurate disclosure of the text included in "Appendix A: Safety & Handling" under the heading "Repairing iPhone" on p. 112 of the iPhone Users Guide.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

18. The above-quoted text in paragraphs 16 and 17 has been included in the iPhone User's Guide at all times. (Jinks Decl. ¶ 8.)

PLAINTIFF'S RESPONSE: Paragraph 8 of the Jinks Declaration is as stated in Paragraph 18 above, however, Plaintiff denies that the quoted text in paragraphs 16 and 17 are full and accurate disclosure of the text included in their respective sources; further, Plaintiff states that the statement in Paragraph 18 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

D. Apple's Website Disclosures

19. The webpage, www.apple.com/batteries, was updated with iPhone-specific information on June 29, 2007. (Vincent Decl. ¶ 4.)

PLAINTIFF'S RESPONSE: Plaintiff states that as the Defendant admitted in its Response to Request to Admit No. 14, attached to Plaintiff's Response to Defendant's Motion for Summary Judgment as Exhibit B, said website did not contain the material terms (i.e., cost, terms, hidden fees, etc.) of the relevant battery replacement program on June 29, 2007. Plaintiff further states that the term "iPhone specific information" is vague, ambiguous and unexplained and that the statement in Paragraph 19 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Request for Admission No. 14 concerns whether the "cost of the battery replacement program" was disclosed at the webpage, www.apple.com/batteries. This undisputed fact does not claim that the cost was disclosed on this page. Therefore, Apple's Response to Request for Admission No. 14 is irrelevant pursuant to Fed. R. Evid. 402 and not contradictory. Thus, plaintiff has presented no contradictory evidence and this fact remains undisputed.

20. The webpage, www.apple.com/batteries, with the iPhone-specific updates has been accessible to the public on Apple's website from June 29, 2007 to the present. (Vincent Decl. ¶ 4.)

PLAINTIFF'S RESPONSE: Plaintiff states that as the Defendant admitted in its Response to Request to Admit 14, attached to Plaintiff's Response to Defendant's Motion for Summary Judgment as Exhibit B, said website did not contain the material terms (i.e., cost, terms, hidden fees, etc.) of the relevant battery replacement program on June 29, 2007. Plaintiff further states that the term "iPhone specific updates" is vague, ambiguous and unexplained and that the statement in Paragraph 20 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Request for Admission No. 14 concerns whether the "cost of the battery replacement program" was disclosed at the webpage, www.apple.com/batteries. This undisputed fact does not claim that the cost was disclosed on this page. Therefore, Apple's Response to Request for Admission No. 14 is irrelevant pursuant to Fed. R. Evid. 402 and not contradictory. Thus, plaintiff has presented no contradictory evidence and this fact remains undisputed.

21. This webpage, www.apple.com/batteries, includes the following statements regarding rechargeable lithium-ion batteries:

> Like other rechargeable batteries, these batteries may eventually require replacement.
>
> You can charge all lithium-ion batteries a large but finite number of times, as defined by charge cycle.
>
> A charge cycle means using all of the battery's power, but that doesn't necessarily mean a single charge. For instance, you could listen to your iPod for a few hours one day, using half its power, and then recharge it fully. If you did the same thing the next day, it would count as one charge cycle, not two, so you may take several days to complete a cycle. Each time you complete a charge cycle, it diminishes battery capacity slightly, but you can put notebook, iPod and iPhone batteries through many charge cycles before they will hold only 80% of original battery capacity. As with other rechargeable batteries, you may eventually need to replace your battery.
>
> **Battery Lifespan** means the total amount of time your battery will last before it must be replaced.

(Vincent Decl. ¶ 5, Ex. A.)

PLAINTIFF'S RESPONSE: Paragraph 5 of the Vincent Declaration is as stated in Paragraph 21 above. Plaintiff further states that the term "includes the following statements" is ambiguous, vague and unexplained as it fails to state the dates/times that Defendant purports such information was available on the Apple website.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

22. The above-quoted text in paragraph 21 has been included at all times from June 29, 2007 to the present. (Vincent Decl. ¶ 6.)

PLAINTIFF'S RESPONSE: Paragraph 6 of the Vincent Declaration is as stated in Paragraph 22 above. Plaintiff states that as the Defendant admitted in its Response to Request to Admit 14, attached to Plaintiff's Response to Defendant's Motion for Summary Judgment as Exhibit B, said website did not contain the material terms (i.e., cost, terms, hidden fees, etc.) of the relevant battery replacement program on June 29, 2007. Plaintiff further states that the statement in Paragraph 22 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Request for Admission No. 14 concerns whether the "cost of the battery replacement program" was disclosed at the webpage, www.apple.com/batteries. This undisputed fact does not claim that the cost was disclosed on this page. Therefore, Apple's Response to Request for Admission No. 14 is irrelevant pursuant to Fed. R. Evid. 402 and not contradictory. Thus, plaintiff has presented no contradictory evidence and this fact remains undisputed.

23. The webpage, www.apple.com/batteries/iphone.html, was uploaded and accessible to the public on Apple's website from June 29, 2007 to the present. (Vincent Decl. ¶ 10.)

PLAINTIFF'S RESPONSE: Plaintiff states that as the Defendant admitted in its Response to Request to Admit 15, attached to Plaintiff's Response to Defendant's Motion for Summary Judgment as Exhibit B, said website did not contain the material terms, (i.e., cost, terms, hidden fees, etc.) of the relevant battery replacement program on June 29, 2007. Plaintiff further states that the statement in Paragraph 23 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Request for Admission No. 15 concerns a different webpage than this undisputed fact, namely www.apple.com/support/iphone/service. Therefore, Apple's Response to Request for Admission No. 15 is irrelevant pursuant to Fed. R. Evid. 402 and not contradictory. Thus, plaintiff has presented no contradictory evidence and this fact remains undisputed.

24. The webpage, www.apple.com/batteries/iphone.html, provides pointers for maximizing the battery life and lifespan of the iPhone battery. It also states:

> "Battery lifespan" means the total amount of time your battery will last before it must be recharged"
>
> **Charge Cycles**: A properly maintained iPhone battery is designed to retain up to 80% of its original capacity at 400 full charge and discharge cycles. You may choose to replace your battery when it no longer holds sufficient charge to meet your needs.

(Vincent Decl. ¶ 11, Ex. C.)

PLAINTIFF'S RESPONSE: Paragraph 11 of the Vincent Declaration is as stated in Paragraph 24 above. Plaintiff further states that the term "pointers" is ambiguous, vague and unexplained. Plaintiff also states that Defendant fails to establish the date/time at which it alleges the above webpage contained the purported language.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

25. The above-quoted text in paragraph 24 has been included at all times from June 29, 2007 to the present. (Vincent Decl. ¶ 12.)

PLAINTIFF'S RESPONSE: Plaintiff states that as the Defendant admitted in its Response to Request to Admit 15, attached to Plaintiff's Response to Defendant's Motion for Summary Judgment as Exhibit B, said website did not contain the material terms (i.e., cost, terms, hidden fees, etc.) of the relevant battery replacement program on June 29, 2007. Plaintiff further states that the statement in paragraph 25 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Request for Admission No. 15 concerns a different webpage than this undisputed fact, namely www.apple.com/support/iphone/service. Therefore, Apple's Response to Request for Admission No. 15 is irrelevant pursuant to Fed. R. Evid. 402 and

not contradictory. Thus, plaintiff has presented no contradictory evidence and this fact remains undisputed.

26. The webpage, www.apple.com/batteries/replacements.html, provides information regarding Apple's battery replacement programs for its various products. (Vincent Decl. ¶ 7.)

PLAINTIFF'S RESPONSE: Paragraph 7 of the Vincent Declaration is as stated in Paragraph 26 above. Plaintiff further states that the terms "information" and "various products" are ambiguous, vague and unexplained.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

27. The webpage, www.apple.com/batteries/replacements.html, was updated with iPhone-specific information on June 29, 2007. (Vincent Decl. ¶ 7.)

PLAINTIFF'S RESPONSE: Defendant's use of the term "iPhone-specific information" is vague and fails to inform the Plaintiff of what information Defendant is referring to. Plaintiff states that the material terms of Defendant's battery replacement program did not appear on said website on June 29, 2007 as evidenced by Group Exhibit A, and Exhibits H-M of Plaintiff's responses to Defendant's Motion for Summary Judgment. Plaintiff further states that the statement in Paragraph 27 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Plaintiff offers the same response to Apple's Undisputed Fact Nos. 27 through 30. All four facts relate to Apple's battery replacement web page, www.apple.com/batteries/replacements.html. Specifically, these four related facts state that Apple's battery replacement web page was updated on June 29, 2007 (UF No. 27), that those updates have been accessible since that time (UF No. 28), and the content of the update — iPhone BRP cost and details — available from June 29, 2007, to the present (UF Nos. 29 and 30). Plaintiff attempts to dispute each of these four related facts by referring to the same set of exhibits (Group Exhibit A and Exhibits H-M) that he claims supports his argument that the BRP details "did not appear" on this web page. None of the cited exhibits contain competent contradictory evidence as to any of these four facts; therefore, Apple's facts (Nos. 27-30) regarding the BRP disclosures on www.apple.com/batteries/replacements.html remain undisputed.

Apple will address the exhibits in turn.

Exhibit A: This "Group Exhibit" is not authorized by the governing rules and fails to satisfy plaintiff's burden of coming forward with *specific* facts. *See Smith v. Lamz,* 321 F.3d 680, 683 (7th Cir. 2003) (affirming summary judgment for defendant because plaintiff's attempt "to support his factual disagreements by affixing to his brief assorted material" was insufficient); *Brasic v. Heinemann's Inc.*, 121 F.3d 281, 285 (7th Cir. 1997) (explaining that Rule 56 requires specific references to affidavits and parts of the record; therefore, plaintiff's reference to "see all exhibits" was insufficient).

Plaintiff's "Group Exhibit" consists of nine separate documents. As set forth in the following table, none of these documents contain competent contradictory evidence:

DOCUMENT	RESPONSE/OBJECTION
June 29, 2007 Letter from Harvey Rosenfield (pp. 1-2)	***Not Authenticated.*** **Apple objects to this document on the grounds that it is not authenticated pursuant to Fed. R. Evid. 901 or 902.**
	Hearsay. **Apple objects to this document on the grounds that it is inadmissible hearsay pursuant to Fed. R. Evid. 802.**
	Not Relevant. **Apple objects to this document on the grounds that it is not relevant pursuant to Fed. R. Evid. 402. This letter states that it was written *the morning before* the release of the iPhone; therefore it is not relevant to the existence, accessibility or content of updates made to Apple's battery replacement web page when the iPhone actually went on sale later that day, and thereafter.**
Gold Coast Bulletin (Australia) story (pp. 2-3)	***Not Authenticated.*** **Apple objects to this document on the grounds that it is not authenticated pursuant to Fed. R. Evid. 901 or 902.**
	Hearsay. **Apple objects to this document on the grounds that both the article itself and the attributed statements within the article are inadmissible hearsay pursuant to Fed. R. Evid. 802.**
	Not Relevant. **Apple objects to this document on the grounds that it is not relevant pursuant to Fed. R. Evid. 402. This Australian media story reports the contents of the Rosenfield letter. As discussed above, this letter states that it was written *the morning before* the release of the iPhone; therefore any discussion of it is not relevant to the existence, accessibility or content of updates made to Apple's battery replacement web page when the iPhone actually went on sale later that day, and thereafter.**

DOCUMENT	RESPONSE/OBJECTION
Oakland Tribune story (pp. 3-4)	***Not Authenticated.*** **Apple objects to this document on the grounds that it is not authenticated pursuant Fed. R. Evid. 901 or 902.**
	Hearsay. **Apple objects to this document on the grounds that both the article itself and the attributed statements within the article are inadmissible hearsay pursuant to Fed. R. Evid. 802.**
	Not Relevant. **Apple objects to this document on the grounds that it is not relevant pursuant to Fed. R. Evid. 402. This media story reports the contents of the Rosenfield letter. As discussed above, this letter states that it was written *the morning before* the release of the iPhone; therefore any discussion of it is not relevant to the existence, accessibility or content of updates made to Apple's battery replacement web page when the iPhone actually went on sale later that day, and thereafter. In addition, the hearsay statement attributed to Jennifer Hakes in this article is ambiguous. At most, it could be read to suggest that the BRP details were posted on Apple's website the same day the iPhone went on sale (June 29, 2007), but after sales commenced. Therefore, this document does not contradict Apple's undisputed facts that its battery replacement webpage was updated with BRP details on June 29, 2007, that such updates have been accessible since that time, and the content of the updates.**
AP story (p. 5)	**Apple asserts the same objections on the grounds of lack of authentication, hearsay and relevance as for the above media story.**
AP story (pp. 6-7)	**Apple asserts the same objections on the grounds of lack of authentication, hearsay and relevance as for the above media story.**
India Daily story (pp. 8-9)	**Apple asserts the same objections on the grounds of lack of authentication, hearsay and relevance as for the above media story.**
CBS/AP story (p. 10)	**Apple asserts the same objections on the grounds of lack of authentication, hearsay and relevance as for the above media story.**
MacUser story (pp. 7-8)	***Not Authenticated.*** **Apple objects to this document on the grounds that it is not authenticated pursuant to Fed. R. Evid. 901 or 902.**

DOCUMENT	RESPONSE/OBJECTION
	Hearsay. **Apple objects to this document on the grounds that both the article itself and the attributed statements within the article are inadmissible hearsay pursuant to Fed. R. Evid. 802.**
	Not Relevant. **Apple objects to this document on the grounds that it is not relevant pursuant to Fed. R. Evid. 402. This media story reports the contents of the Rosenfield letter. As discussed above, this letter states that it was written *the morning before* the release of the iPhone; therefore any discussion of it is not relevant to the existence, accessibility or content of updates made to Apple's battery replacement web page when the iPhone actually went on sale later that day, and thereafter. In addition, the hearsay statement attributed to Jennifer Hakes in this article is ambiguous. At most, it could be read to suggest that the BRP details were posted on Apple's website the same day the iPhone went on sale (June 29, 2007), but after sales commenced. Further, this report states that Apple did disclose the cost for an out-of-warranty iPhone battery replacement just before the iPhone went on sale. Therefore, this document does not contradict Apple's undisputed facts that its battery replacement webpage was updated with BRP details on June 29, 2007, that such updates have been accessible since that time, and the content of the updates.**
AppleInsider story (p. 11)	***Not Authenticated.*** **Apple objects to this undated document on the grounds that it is not authenticated pursuant to Fed. R. Evid. 901 or 902.**
	Hearsay. **Apple objects to this document on the grounds that both the article itself and the attributed statements within the article are inadmissible hearsay pursuant to Fed. R. Evid. 802.**
	Not Relevant. **Apple objects to this document on the grounds that it is not relevant pursuant to Fed. R. Evid. 402. This media report has no relevance to the existence, accessibility or content of updates made to Apple's battery replacement web page on June 29, 2007. This undated article in no way states that Apple did not make such disclosures on June 29, 2007. Indeed, it appears to confirm that this information was being discussed on Monday, July 2. Therefore, this document does not contradict Apple's undisputed facts that its battery replacement webpage was updated with BRP details on June 29, 2007, that such updates have been accessible since that time, and the content of the updates.**

Exhibit H: This exhibit is Apple's entire set of responses to plaintiff's special interrogatories. Plaintiff has pointed to no specific response as required. Therefore, this entire exhibit should be disregarded. *See Ammons v. Aramark Unif. Servs.*, 368 F.3d 809, 817 (7th Cir. 2004) (explaining that non-moving party must include specific references, not citations to entire depositions or entire exhibits). Indeed, Apple's Responses to Interrogatory Nos. 2, 4, 7 and 10 confirm that Apple's battery replacement web page was updated with iPhone BRP details on June 29, 2007, at 6 p.m., and that these updates have been available since that time. Nothing in the cited exhibit contains contradictory evidence.

Exhibit I: Apple objects to this e-mail chain to the extent that it contains inadmissible hearsay pursuant to Fed. R. Evid. 802, specifically the embedded e-mail from Daniel Frommer to Jennifer Bowcock and Jennifer Hakes. Apple also objects that this exhibit is irrelevant under Fed. R. Evid. 402 to the existence, accessibility or content of updates made to Apple's battery replacement web page when the iPhone actually went on sale on June 29, 2007, and thereafter, because it concerns an exchange on June 13, 2007 — two weeks before the iPhone went on sale. The undisputed facts at issue do not claim that disclosure was made prior to June 29, 2007. Therefore, nothing in this exhibit contains competent contradictory evidence.

Exhibit J: Apple objects that this exhibit is irrelevant under Fed. R. Evid. 402 to the existence, accessibility or content of updates made to Apple's battery replacement web page when the iPhone actually went on sale on June 29, 2007, and thereafter, because it concerns an e-mail exchange on June 28, 2007 — before the iPhone went on sale. The undisputed facts at issue do not claim that disclosure was made prior to June 29, 2007. Therefore, nothing in this exhibit contains contradictory evidence.

Exhibit K: Apple objects to this e-mail chain to the extent that it contains inadmissible hearsay pursuant to Fed. R. Evid. 802, specifically the embedded e-mail from Carol Hernandez to Jennifer Hakes if this e-mail is offered to prove the existence of an inquiry from Michelle Kessler at USA Today. Apple also objects that this exhibit is irrelevant under Fed. R. Evid. 402 to the existence, accessibility or content of updates made to Apple's battery replacement web page when the iPhone actually went on sale on June 29, 2007, and thereafter — before the iPhone went on sale. The undisputed facts at issue do not claim

that disclosure was made prior to June 29, 2007. Therefore, nothing in this exhibit contains competent contradictory evidence.

Exhibit L: Apple objects to this e-mail on the grounds that is not relevant pursuant to Fed. R. Evid. 402 to the existence, accessibility or content of updates made to Apple's battery replacement web page when the iPhone actually went on sale on June 29, 2007, and thereafter. It clearly states that a *service* link on a *different* web page, www.apple.com/support/iphone/service/battery, was not active on August 6, 2007. It makes no reference to Apple's battery replacement web page, www.apple.com/batteries/replacements.html, the only web page at issue in these four undisputed facts. (Indeed, the service link was to an "iPhone service request form" that would allow users to initiate an out-of-warranty repair. As the e-mail makes clear, the link was not active because there would be no need for out-of-warranty repairs until eleven months later (when the first units sold started coming out of warranty in late June 2008).) Therefore, nothing in this exhibit contains contradictory evidence.

Exhibit M: This exhibit is Lance Kunnuth's Declaration. Plaintiff has pointed to no specific paragraph(s) as required. Therefore, this entire exhibit should be disregarded. *See Ammons*, 368 F.3d at 817. Apple objects that this exhibit is irrelevant under Fed. R. Evid. 402 because it does not even refer to the webpage, www.apple.com/batteries/replacements.html, at issue in these four undisputed facts. Therefore, nothing in this exhibit contains contradictory evidence.

Thus, plaintiff has presented no contradictory evidence and these four undisputed facts (Nos. 27-30) remain undisputed.

28. The webpage, www.apple.com/batteries/replacements.html, with the iPhone-specific updates has been accessible to the public on Apple's website from June 29, 2007 to the present. (Vincent Decl. ¶ 7.)

PLAINTIFF'S RESPONSE: Defendant's use of the term "iPhone-specific" is vague and fails to inform the Plaintiff of what information Defendant is referring to. Plaintiff states that the material terms of Defendant's battery replacement program did not appear on said website on June 29, 2007 as evidenced by Group Exhibit A, and Exhibits H-M of Plaintiff's Response to Defendant's Motion for Summary Judgment. Plaintiff further states that the statement in

Paragraph 28 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Plaintiff offers the same response to Apple's Undisputed Fact Nos. 27 through 30. All four facts relate to Apple's battery replacement web page, www.apple.com/batteries/replacements.html. Specifically, these four related facts state that Apple's battery replacement web page was updated on June 29, 2007 (UF No. 27), that those updates have been accessible since that time (UF No. 28), and the content of the update — iPhone BRP cost and details — available from June 29, 2007, to the present (UF Nos. 29 and 30). Plaintiff attempts to dispute each of these four related facts by referring to the same set of exhibits (Group Exhibit A and Exhibits H-M) that he claims supports his argument that the BRP details "did not appear" on this web page.

To avoid repetition, Apple incorporates by reference its specific objections to these exhibits set forth above in its Reply to Plaintiff's Response to Undisputed Fact No. 27. Each of those objections applies with equal force in reply to Plaintiff's Response to Undisputed Facts Nos. 28, 29 and 30. None of the cited exhibits contain competent contradictory evidence as to any of these four facts; therefore, Apple's facts (Nos. 27-30) regarding the BRP disclosures on www.apple.com/batteries/replacements.html remain undisputed.

29. The webpage, www.apple.com/batteries/replacements.html, provides detailed information regarding Apple's battery replacement program. For the iPhone, it contains the following information:

> **iPhone Owners.** Your one-year warranty includes replacement coverage for a defective battery. You can extend your coverage to two years from the date of your iPhone purchase with the AppleCare Protection Plan for iPhone. During the plan's coverage period, Apple will replace the battery if it drops below 50% of its original capacity. If it is out of warranty, Apple offers a battery replacement for $79, plus $6.95 shipping, subject to local tax.

(Vincent Decl. ¶ 8, Ex. B.)

PLAINTIFF'S RESPONSE: Paragraph 8 of the Vincent Declaration is as stated in Paragraph 29 above. Plaintiff states that the term "detailed information" is ambiguous, vague and unexplained, and that said information did not appear on the on the website on June 29, 2007 based upon Group Exhibit A and Exhibits H-M to Plaintiff's Response to Defendant's Motion for Summary

Judgment. Plaintiff further state that the statement in Paragraph 29 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Plaintiff offers the same response to Apple's Undisputed Fact Nos. 27 through 30. All four facts relate to Apple's battery replacement web page, www.apple.com/batteries/replacements.html. Specifically, these four related facts state that Apple's battery replacement web page was updated on June 29, 2007 (UF No. 27), that those updates have been accessible since that time (UF No. 28), and the content of the update — iPhone BRP cost and details — available from June 29, 2007, to the present (UF Nos. 29 and 30). Plaintiff attempts to dispute each of these four related facts by referring to the same set of exhibits (Group Exhibit A and Exhibits H-M) that he claims supports his argument that the BRP details "did not appear" on this web page.

To avoid repetition, Apple incorporates by reference its specific objections to these exhibits set forth above in its Reply to Plaintiff's Response to Undisputed Fact No. 27. Each of those objections applies with equal force in reply to Plaintiff's Response to Undisputed Facts Nos. 28, 29 and 30. None of the cited exhibits contain competent contradictory evidence as to any of these four facts; therefore, Apple's facts (Nos. 27-30) regarding the BRP disclosures on www.apple.com/batteries/replacements.html remain undisputed.

30. The above-quoted text in paragraph 29 has been included at all times from June 29, 2007 to the present. (Vincent Decl. ¶ 9.)

PLAINTIFF'S RESPONSE: Plaintiff denies the statements in paragraph 30 based upon Group Exhibit A and Exhibits H-M of Plaintiff's Response to Defendant's Motion for Summary Judgment.

APPLE'S REPLY: Plaintiff offers the same response to Apple's Undisputed Fact Nos. 27 through 30. All four facts relate to Apple's battery replacement web page, www.apple.com/batteries/replacements.html. Specifically, these four related facts state that Apple's battery replacement web page was updated on June 29, 2007 (UF No. 27), that those updates have been accessible since that time (UF No. 28), and the content of the update — iPhone BRP cost and details — available from June 29, 2007, to the present (UF Nos. 29 and 30). Plaintiff attempts to dispute each of these four related facts by referring

to the same set of exhibits (Group Exhibit A and Exhibits H-M) that he claims supports his argument that the BRP details "did not appear" on this web page.

To avoid repetition, Apple incorporates by reference its specific objections to these exhibits set forth above in its Reply to Plaintiff's Response to Undisputed Fact No. 27. Each of those objections applies with equal force in reply to Plaintiff's Response to Undisputed Facts Nos. 28, 29 and 30. None of the cited exhibits contain competent contradictory evidence as to any of these four facts; therefore, Apple's facts (Nos. 27-30) regarding the BRP disclosures on www.apple.com/batteries/replacements.html remain undisputed.

31. Apple first posted technical specifications for the iPhone on its website on January 9, 2007, at www.apple.com/iphone/technology/specs.html. (Vincent Decl. ¶ 13.)

PLAINTIFF'S RESPONSE: Paragraph 13 of the Vincent Declaration is as stated in Paragraph 31 above. Plaintiff states that the term "technical specifications" is ambiguous, vague and unexplained. Plaintiff further states that the statement in Paragraph 31 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

32. These technical specifications stated:

> Rechargeable batteries have a limited number of charge cycles and may eventually need to be replaced. Battery life and number of charge cycles vary by use and settings. See www.apple.com/batteries for more information.

(Vincent Decl. ¶ 13, Ex. D.)

PLAINTIFF'S RESPONSE: Plaintiff denies that Paragraph 32 above is a full and accurate disclosure of the statement and/or text included in the Technical Specifications. Plaintiff further states that the term "technical specification" is ambiguous, vague, and unexplained, and the term "stated" is ambiguous, vague and unexplained as it fails to state the dates/times that Defendant purports such information was available on the Apple website.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

33. More detailed technical specifications for the iPhone were uploaded and accessible to the public on Apple's website at www.apple.com/iphone/specs.html from June 19, 2007 to the present. (Vincent Decl. ¶ 14.)

PLAINTIFF'S RESPONSE: Paragraph 14 of the Vincent Declaration is as stated in Paragraph 33 above. Plaintiff states that the term "more detailed technical specifications" is ambiguous, vague and unexplained. Plaintiff further states that the statement in Paragraph 33 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

34. The technical specifications uploaded on June 19, 2007 replaced the technical specifications discussed in paragraph 31. (Vincent Decl. ¶ 15.)

PLAINTIFF'S RESPONSE: Paragraph 15 of Vincent's Declaration is as stated in Paragraph 34 above. Plaintiff states that the term "technical specifications" is ambiguous, vague, and unexplained as Defendant does not indicate the specific "technical specifications" that it purports replaced some other undisclosed "technical specifications". Plaintiff further states that the statement in Paragraph 34 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

35. The technical specifications uploaded on June 19, 2007 state:

> Rechargeable batteries have a limited number of charge cycles and may eventually need to be replaced. See www.apple.com/batteries for more information.

(Vincent Decl. ¶ 14, Ex. E.)

PLAINTIFF'S RESPONSE: Plaintiff denies that Paragraph 35 above is a full and accurate disclosure of the statement and/or text included in the purportedly uploaded "technical specifications" on June 19, 2007. Plaintiff further states that the term "technical specifications" is ambiguous, vague, and unexplained.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

36. The quoted content from the iPhone technical specifications uploaded on June 19, 2007 has been included at all times since that date. (Vincent Decl. ¶ 15.)

PLAINTIFF'S RESPONSE: Paragraph 15 of the Vincent Declaration is as stated in Paragraph 36 above. Plaintiff states that the term "quoted content" is ambiguous, vague and unexplained in that it fails to identify the "quoted content" to which it refers. Plaintiff further states that the statement in Paragraph 36 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

37. Support pages were uploaded to the Apple website for the iPhone on June 29, 2007. (Declaration of Lance Kunnuth in Support of Apple's Motion for Summary Judgment ("Kunnuth Decl.") ¶ 2.)

PLAINTIFF'S RESPONSE: The statement in Paragraph 37 above is not an undisputed material fact because Defendant's term "support pages" is vague, and Defendant fails to identify those "support pages" to which it refers. Plaintiff further states that the statement in Paragraph 37 is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

38. Both www.apple.com/support/iphone/service/battery and www.apple.com/support/iphone/service/faq were uploaded and accessible to the public on Apple's website from June 29, 2007 to the present. (Kunnuth Decl. ¶ 2.)

PLAINTIFF'S RESPONSE: Plaintiff denies the statements in Paragraph 38 based on Group Exhibit A and Exhibits H-M of Plaintiff's Response to Defendant's Motion for Summary Judgment.

APPLE'S REPLY: Plaintiff offers the same response to Apple's Undisputed Fact Nos. 38 through 43. All six facts relate to two iPhone support pages on Apple's website: www.apple.com/support/iphone/service/battery and www.apple.com/support/iphone/service/faq. Specifically, the undisputed facts state that these two iPhone support pages were uploaded on June 29, 2007 when the iPhone went on sale, and that these two support pages have been accessible (UF No. 38) and have included BRP -related content since that time (UF Nos. 39-43.) Plaintiff attempts to dispute these six related facts by referring to the same set of exhibits (Group Exhibit A and Exhibits H-M) that he claims supports his argument that the BRP details "did not appear" on these

web pages. None of the cited exhibits contain competent contradictory evidence as to any of these six facts; therefore, Apple's facts regarding the BRP disclosures on its iPhone support pages (Nos. 38-43) remain undisputed.

Apple will address the exhibits in turn.

Exhibit A: This "Group Exhibit" is not authorized by the governing rules and fails to satisfy plaintiff's burden of coming forward with specific facts. *See Smith v. Lamz,* 321 F.3d 680, 683 (7th Cir. 2003) (affirming summary judgment for defendant because plaintiff's attempt "to support his factual disagreements by affixing to his brief assorted material" was insufficient); *Brasic v. Heinemann's Inc.,* 121 F.3d 281, 285 (7th Cir. 1997) (explaining that Rule 56 requires specific references to affidavits and parts of the record; therefore, plaintiff's reference to "see all exhibits" was insufficient).

Plaintiff's "Group Exhibit" consists of nine separate documents. As set forth in the following table, none of these documents contain competent contradictory evidence:

DOCUMENT	**RESPONSE/OBJECTION**
June 29, 2007 Letter from Harvey Rosenfield (pp. 1-2)	***Not Authenticated.* Apple objects to this document on the grounds that it is not authenticated pursuant to Fed. R. Evid. 901 or 902.**
	***Hearsay.* Apple objects to this document on the grounds that it is inadmissible hearsay pursuant to Fed. R. Evid. 802.**
	***Not Relevant.* Apple objects to this document on the grounds that it is not relevant pursuant to Fed. R. Evid. 402. This letter states that it was written *the morning before* the release of the iPhone; therefore it is not relevant to the existence, accessibility or content of two iPhone support web pages added to Apple's website by the time the iPhone went on sale later that day, and available thereafter.**
Gold Coast Bulletin (Australia) story (pp. 2-3)	***Not Authenticated.* Apple objects to this document on the grounds that it is not authenticated pursuant to Fed. R. Evid. 901 or 902.**
	***Hearsay.* Apple objects to this document on the grounds that both the article itself and the attributed statements within the article are inadmissible hearsay pursuant to Fed. R. Evid. 802.**
	***Not Relevant.* Apple objects to this document on the grounds that it is not relevant pursuant to Fed. R. Evid. 402. This Australian media story reports the contents of the Rosenfield letter. As discussed above, this letter states that it was written *the morning before* to the release of the iPhone; therefore any**

DOCUMENT	**RESPONSE/OBJECTION**
	discussion of it is not relevant to the existence, accessibility or content of two iPhone support pages added to Apple's website by the time the iPhone actually went on sale later that day, and available thereafter.
Oakland Tribune story (pp. 3-4)	***Not Authenticated.*** **Apple objects to this document on the grounds that it is not authenticated pursuant to Fed. R. Evid. 901 or 902.**
	Hearsay. **Apple objects to this document on the grounds that both the article itself and the attributed statements within the article are inadmissible hearsay pursuant to Fed. R. Evid. 802.**
	Not Relevant. **Apple objects to this document on the grounds that it is not relevant pursuant to Fed. R. Evid. 402. This media story reports the contents of the Rosenfield letter. As discussed above, this letter states that it was written *the morning before* the release of the iPhone; therefore any discussion of it is not relevant to the existence, accessibility or content of two iPhone support pages added to Apple's website by the time the iPhone went on sale later that day, and available thereafter. In addition, the hearsay statement attributed to Jennifer Hakes is ambiguous. At most, it could be read to suggest that the BRP details were posted on Apple's website the same day the iPhone went on sale (June 29, 2007), but after sales commenced. Therefore, this document does not contradict Apple's undisputed facts that the two iPhone support web pages were uploaded on June 29, 2007, and the accessibility and content of those pages from that time to the present.**
AP story (p. 5)	**Apple asserts the same objections on the grounds of lack of authentication, hearsay and relevance as for the above media story.**
AP story (pp. 6-7)	**Apple asserts the same objections on the grounds of lack of authentication, hearsay and relevance as for the above media story.**
India Daily story (pp. 8-9)	**Apple asserts the same objections on the grounds of lack of authentication, hearsay and relevance as for the above media story.**
CBS/AP story (p. 10)	**Apple asserts the same objections on the grounds of lack of authentication, hearsay and relevance as for the above media story.**

DOCUMENT	RESPONSE/OBJECTION
MacUser story (pp. 7-8)	***Not Authenticated.* Apple objects to this document on the grounds that it is not authenticated pursuant to Fed. R. Evid. 901 or 902.**
	***Hearsay.* Apple objects to this document on the grounds that both the article itself and the attributed statements within the article are inadmissible hearsay pursuant to Fed. R. Evid. 802.**
	***Not Relevant.* Apple objects to this document on the grounds that it is not relevant pursuant to Fed. R. Evid. 402. This media story reports the contents of the Rosenfield letter. As discussed above, this letter states that it was written *the morning before* the release of the iPhone; therefore any discussion of it is not relevant to the existence, accessibility or content of iPhone support pages added to Apple's website by the time the iPhone actually went on sale later that day, and available thereafter. In addition, the hearsay statement attributed to Jennifer Hakes is ambiguous. At most, it could be read to suggest that the BRP details were posted on Apple's website the same day the iPhone went on sale (June 29, 2007), but after sales commenced. Further, this report states that Apple did disclose the iPhone BRP cost just before the iPhone went on sale. Therefore, this document does not contradict Apple's undisputed facts that the two iPhone support web pages were uploaded on June 29, 2007, and the accessibility and content of those pages from that time to the present.**
AppleInsider story (p. 11)	***Not Authenticated.* Apple objects to this document on the grounds that it is not authenticated pursuant to Fed. R. Evid. 901 or 902.**
	***Hearsay.* Apple objects to this document on the grounds that both the article itself and the attributed statements within the article are inadmissible hearsay pursuant to Fed. R. Evid. 802.**
	***Not Relevant.* Apple objects to this document on the grounds that it is not relevant pursuant to Fed. R. Evid. 402. This media report has no relevance to the existence, accessibility or content of iPhone support pages uploaded on June 29, 2007. This undated article in no way states that Apple did not make such disclosures on June 29, 2007. Indeed, it appears to confirm that the content of these pages — the costs and details of the BRP — was being discussed on Monday, July 2. Therefore, this document does not contradict Apple's undisputed facts that the two iPhone support web pages were uploaded on June 29, 2007, and the accessibility and content of those pages from that time to the present.**

Exhibit H: This exhibit is Apple's entire set of responses to plaintiff's special interrogatories. Plaintiff has pointed to no specific response as required. Therefore, this entire exhibit should be disregarded. *See Ammons v. Aramark Unif. Servs.*, 368 F.3d 809, 817 (7th Cir. 2004) (explaining that non-moving party must include specific references, not citations to entire depositions or entire exhibits). Indeed, Apple's Responses to Interrogatory Nos. 2, 4, 8 and 10 confirm that the two iPhone support pages containing BRP details were uploaded on June 29, 2007, at 4 p.m., and the accessibility and content of those web pages from that time to the present. Nothing in the cited exhibit contains contradictory evidence.

Exhibit I: Apple objects to this e-mail chain to the extent that it contains inadmissible hearsay pursuant to Fed. R. Evid. 802, specifically the embedded e-mail from Daniel Frommer to Jennifer Bowcock and Jennifer Hakes. Apple also objects that this exhibit is irrelevant under Fed. R. Evid. 402 to the existence, accessibility or content of two iPhone support pages available on June 29, 2007, and thereafter, because it concerns an exchange on June 13, 2007 — two weeks before the iPhone went on sale. The undisputed facts at issue do not claim that disclosure was made prior to June 29, 2007. Therefore, nothing in this exhibit contains competent contradictory evidence.

Exhibit J: Apple objects that this exhibit is irrelevant under Fed. R. Evid. 402 to the existence, accessibility or content of two iPhone support pages available on June 29, 2007, and thereafter, because it concerns an e-mail exchange on June 28, 2007 — before the iPhone went on sale. The undisputed facts at issue do not claim that disclosure was made prior to June 29, 2007. Therefore, nothing in this exhibit contains contradictory evidence.

Exhibit K: Apple objects to this e-mail chain to the extent that it contains inadmissible hearsay pursuant to Fed. R. Evid. 802, specifically the embedded e-mail from Carol Hernandez to Jennifer Hakes if this e-mail is offered to prove the existence of an inquiry from Michelle Kessler at USA Today. Apple also objects that this exhibit is irrelevant under Fed. R. Evid. 402 to the existence, accessibility and content of two iPhone support pages available on June 29, 2007, and thereafter, because it concerns an exchange on June 28, 2007 — before the iPhone went on sale. The undisputed facts at issue do not claim that

disclosure was made prior to June 29, 2007. Therefore, nothing in this exhibit contains competent contradictory evidence.

Exhibit L: Apple objects to this e-mail on the grounds that is not relevant pursuant to Fed. R. Evid. 402 to the existence, accessibility and content of certain BRP-related information on two iPhone support pages available on June 29, 2007, and thereafter. It clearly states that a *service* link on one of the support pages (www.apple.com/support/iphone/service/battery) was not active on August 6, 2007. The service link was to an "iPhone service request form" that would allow users to initiate an out-of-warranty repair. As the e-mail makes clear, the link was not active because there would be no need for out-of-warranty repairs until eleven months later (when the first units sold started coming out of warranty in late June 2008). Therefore, nothing in this exhibit contains contradictory evidence.

Exhibit M: This exhibit is Lance Kunnuth's Declaration. Plaintiff has pointed to no specific paragraph(s) as required. Therefore, this entire exhibit should be disregarded. *See Ammons*, 368 F.3d at 817. In fact, this declaration was specifically cited by Apple as its support for these undisputed facts — the uploading and accessibility of the two iPhone support pages on June 29, 2007 (paragraph 2), and the BRP-related content of those pages from that time to the present (paragraphs 3-6). Plaintiff's citation to this same declaration to attempt to create a dispute is nonsense. Nothing in this declaration contains contradictory evidence.

Thus, plaintiff has presented no contradictory evidence and this fact remains undisputed.

39. The webpage, www.apple.com/support/iphone/service/battery, contains Frequently Asked Questions (FAQ) regarding the iPhone Out-of-Warranty Battery Replacement Program, including the following information:

> **What is the iPhone Battery Replacement Program?**
>
> If your iPhone requires service only because the battery's ability to hold an electrical charge has diminished, Apple will repair your iPhone for a service fee of $79, plus $6.95 shipping. . . .
>
> **How much does it cost to participate in the program?**
>
> The program costs $79, plus $6.95 shipping. The program cost is $85.95 per unit. All fees are in US dollars and subject to local

> tax . . . . Please review Apple's Repair Terms and Conditions for further details.
>
> **Will the data on my iPhone be preserved?**
>
> No, the repair process will clear all data from your iPhone. It is important to sync your iPhone with iTunes to back up your contacts, photos, email account settings, text messages, and more. Apple is not responsible for the loss of information while servicing your iPhone and does not offer any data transfer service . . . .
>
> **How long will service take?**
>
> The repair process normally takes three business days. See the iPhone Service FAQ for information about getting an AppleCare Service Phone for you to use with all of your data while your iPhone is being repaired.

(Kunnuth Decl. ¶ 3, Ex. A.)

PLAINTIFF'S RESPONSE: Plaintiff denies that said information appeared on the noted website on June 29, 2007 or for a substantial time thereafter as evidenced by Plaintiff's Group Exhibit A and Exhibits H-M of Plaintiff's Response to Defendant's Motion for Summary Judgment.

APPLE'S REPLY: Plaintiff offers the same response to Apple's Undisputed Fact Nos. 38 through 43. All six facts relate to two iPhone support pages on Apple's website: www.apple.com/support/iphone/service/battery and www.apple.com/support/iphone/service/faq. Specifically, the undisputed facts state that these two iPhone support pages were uploaded on June 29, 2007 when the iPhone went on sale, and that these two support pages have been accessible (UF No. 38) and have included BRP -related content since that time (UF Nos. 39-43.) Plaintiff attempts to dispute these six related facts by referring to the same set of exhibits (Group Exhibit A and Exhibits H-M) that he claims supports his argument that the BRP details "did not appear" on these web pages.

To avoid repetition, Apple incorporates by reference its specific objections to these exhibits set forth above in its Reply to Plaintiff's Response to Undisputed Fact No. 38. Each of those objections applies with equal force in reply to Plaintiff's Response to Undisputed Facts Nos. 39 through 43. None of the cited exhibits contain competent contradictory evidence as to any of these facts; therefore, Apple's facts regarding the BRP disclosures on its iPhone support pages (Nos. 38-43) remain undisputed.

40. The above-quoted text in paragraph 39 has been included at all times. (Kunnuth Decl. ¶ 4.)

PLAINTIFF'S RESPONSE: Plaintiff denies the statements contained in Paragraph 40 based upon Plaintiff s Group Exhibit A and Exhibits H-M of Plaintiff s Response to Defendant's Motion for Summary Judgment.

APPLE'S REPLY: Plaintiff offers the same response to Apple's Undisputed Fact Nos. 38 through 43. All six facts relate to two iPhone support pages on Apple's website: www.apple.com/support/iphone/service/battery and www.apple.com/support/iphone/service/faq. Specifically, the undisputed facts state that these two iPhone support pages were uploaded on June 29, 2007 when the iPhone went on sale, and that these two support pages have been accessible (UF No. 38) and have included BRP -related content since that time (UF Nos. 39-43.) Plaintiff attempts to dispute these six related facts by referring to the same set of exhibits (Group Exhibit A and Exhibits H-M) that he claims supports his argument that the BRP details "did not appear" on these web pages.

To avoid repetition, Apple incorporates by reference its specific objections to these exhibits set forth above in its Reply to Plaintiff's Response to Undisputed Fact No. 38. Each of those objections applies with equal force in reply to Plaintiff's Response to Undisputed Facts Nos. 39 through 43. None of the cited exhibits contain competent contradictory evidence as to any of these facts; therefore, Apple's facts regarding the BRP disclosures on its iPhone support pages (Nos. 38-43) remain undisputed.

41. The webpage, www.apple.com/support/iphone/service/faq, contains answers to Frequently Asked Questions (FAQ) about the iPhone repair process and the iPhone warranty, as well as about AppleCare Service Phones. (Kunnuth Decl. ¶ 5.)

PLAINTIFF'S RESPONSE: Plaintiff denies that said information appeared on the noted website on June 29, 2007 or for a substantial time thereafter as evidenced by Group Exhibit A and Exhibits H-M of Plaintiff's Response to Defendant's Motion for Summary Judgment.

APPLE'S REPLY: Plaintiff offers the same response to Apple's Undisputed Fact Nos. 38 through 43. All six facts relate to two iPhone support pages on Apple's website: www.apple.com/support/iphone/service/battery and www.apple.com/support/iphone/service/faq. Specifically, the undisputed facts state that

these two iPhone support pages were uploaded on June 29, 2007 when the iPhone went on sale, and that these two support pages have been accessible (UF No. 38) and have included BRP -related content since that time (UF Nos. 39-43.) Plaintiff attempts to dispute these six related facts by referring to the same set of exhibits (Group Exhibit A and Exhibits H-M) that he claims supports his argument that the BRP details "did not appear" on these web pages.

To avoid repetition, Apple incorporates by reference its specific objections to these exhibits set forth above in its Reply to Plaintiff's Response to Undisputed Fact No. 38. Each of those objections applies with equal force in reply to Plaintiff's Response to Undisputed Facts Nos. 39 through 43. None of the cited exhibits contain competent contradictory evidence as to any of these facts; therefore, Apple's facts regarding the BRP disclosures on its iPhone support pages (Nos. 38-43) remain undisputed.

42. From the time it was originally uploaded on June 29, 2007, until November 2007, this Service FAQ disclosed the availability and cost of AppleCare Service Phones as follows:

> **If I need to have my iPhone repaired, will I be able to borrow an iPhone to use?**
>
> Apple can provide an AppleCare Service Phone for you to use with all of your data while your iPhone is being repaired. The service fee for the AppleCare Service phone is $29. For more details please review the iPhone Rental Terms and Conditions.

(Kunnuth Decl. ¶ 5.)

PLAINTIFF'S RESPONSE: Plaintiff denies the statements contained in Paragraph 42 based upon Plaintiff's Group Exhibit A and Exhibits H-M of Plaintiff's Response to Defendant's Motion for Summary Judgment.

APPLE'S REPLY: Plaintiff offers the same response to Apple's Undisputed Fact Nos. 38 through 43. All six facts relate to two iPhone support pages on Apple's website: www.apple.com/support/iphone/service/battery and www.apple.com/support/iphone/service/faq. Specifically, the undisputed facts state that these two iPhone support pages were uploaded on June 29, 2007 when the iPhone went on sale, and that these two support pages have been accessible (UF No. 38) and have included BRP -related content since that time (UF Nos. 39-43.) Plaintiff attempts to dispute these six related facts by referring to the same set of exhibits (Group Exhibit A and Exhibits H-

M) that he claims supports his argument that the BRP details "did not appear" on these web pages.

To avoid repetition, Apple incorporates by reference its specific objections to these exhibits set forth above in its Reply to Plaintiff's Response to Undisputed Fact No. 38. Each of those objections applies with equal force in reply to Plaintiff's Response to Undisputed Facts Nos. 39 through 43. None of the cited exhibits contain competent contradictory evidence as to any of these facts; therefore, Apple's facts regarding the BRP disclosures on its iPhone support pages (Nos. 38-43) remain undisputed.

43. While the precise wording of the Service FAQ was changed in November 2007, it has at all times disclosed the availability and $29 cost of AppleCare Service Phones for rental while a customer's unit is being repaired. (Kunnuth Decl. ¶ 6.)

PLAINTIFF'S RESPONSE: Plaintiff denies the statements contained in Paragraph 43 based upon Plaintiff's Group Exhibit A and Exhibits H-M of Plaintiff's Response to Defendant's Motion for Summary Judgment.

APPLE'S REPLY: Plaintiff offers the same response to Apple's Undisputed Fact Nos. 38 through 43. All six facts relate to two iPhone support pages on Apple's website: www.apple.com/support/iphone/service/battery and www.apple.com/support/iphone/service/faq. Specifically, the undisputed facts state that these two iPhone support pages were uploaded on June 29, 2007 when the iPhone went on sale, and that these two support pages have been accessible (UF No. 38) and have included BRP -related content since that time (UF Nos. 39-43.) Plaintiff attempts to dispute these six related facts by referring to the same set of exhibits (Group Exhibit A and Exhibits H-M) that he claims supports his argument that the BRP details "did not appear" on these web pages.

To avoid repetition, Apple incorporates by reference its specific objections to these exhibits set forth above in its Reply to Plaintiff's Response to Undisputed Fact No. 38. Each of those objections applies with equal force in reply to Plaintiff's Response to Undisputed Facts Nos. 39 through 43. None of the cited exhibits contain competent contradictory evidence as to any of these facts; therefore, Apple's facts regarding the BRP disclosures on its iPhone support pages (Nos. 38-43) remain undisputed.

E. The iPhone Warranty

44. Each iPhone comes with Apple's One-Year Limited Warranty. (Declaration of Arin Knuth in Support of Apple's Motion for Summary Judgment ("Knuth Decl.") ¶ 2, Ex. A.)

PLAINTIFF'S RESPONSE: Paragraph 2 of the Knuth Declaration is as stated in Paragraph 44 above. However, Plaintiff states that the statement in paragraph 44 above is not an undisputed material fact as Apple's business practices are unknown to Plaintiff.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

45. Apple's One-Year Limited Warranty contains the following statement:

> ALL EXPRESS AND IMPLIED WARRANTIES, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES AND CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ARE LIMITED IN TIME TO THE TERM OF THIS LIMITED WARRANTY.

(Knuth Decl., Ex. A.)

PLAINTIFF'S RESPONSE: Plaintiff denies that Paragraph 45 above is a full and accurate disclosure of the statement and/or text included in Apple's One-Year Limited Warranty.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

46. Under Apple's warranty policies, Apple would replace an iPhone battery if it dropped below 50% of its original capacity in the first year of purchase. (Knuth Decl. ¶ 3.)

PLAINTIFF'S RESPONSE: Paragraph 3 of the Knuth Declaration is as stated in Paragraph 46 above. Plaintiff further states that paragraph 46 is not an undisputed fact because what "Apple would" do if an iPhone battery falls below 50% of its original capacity during the first year of purchase is within the control of the Defendant alone, and Defendant's business practices are unknown to Plaintiff.

APPLE'S REPLY: Plaintiff has presented no contradictory evidence; therefore, this fact remains undisputed.

F. Plaintiff's iPhone

47. According to Apple's customer and service records, Plaintiff Jose Trujillo purchased an iPhone on July 5, 2007. (Knuth Decl. ¶ 5.)

PLAINTIFF'S RESPONSE: Plaintiff denies the statements contained in Paragraph 47 based upon Plaintiff's Group Exhibit A and Exhibits H-M of Plaintiff's Response to Defendant's Motion for Summary Judgment.

APPLE'S REPLY: None of the cited exhibits contain competent contradictory evidence; therefore, this fact remains undisputed. Apple will address these exhibits in turn below.

Apple notes separately that plaintiff's purchase history was the subject of extensive briefing and declarations in the context of AT&T Mobility's motion to compel arbitration. That briefing revealed that plaintiff is associated with the purchase of two iPhones: one on July 5, 2007, from an AT&T Mobility retail store, and one on July 2, 2007, from an Apple retail store. Plaintiff attached to his supplemental brief a purchase invoice for the July 2, 2007 purchase. For the Court's convenience, a copy of plaintiff's submission is attached as Exhibit B to the Declaration of Andrew Muhlbach. This additional level of purchase detail is not material to this motion because both purchases took place after June 29, 2007, when Apple made the disclosures at issue.

Exhibit A: This "Group Exhibit" is not authorized by the governing rules and fails to satisfy plaintiff's burden of coming forward with specific facts. *See Smith v. Lamz*, 321 F.3d 680, 683 (7th Cir. 2003) (affirming summary judgment for defendant because plaintiff's attempt "to support his factual disagreements by affixing to his brief assorted material" was insufficient); *Brasic v. Heinemann's Inc.*, 121 F.3d 281, 285 (7th Cir. 1997) (explaining that Rule 56 requires specific references to affidavits and parts of the record; therefore, plaintiff's reference to "see all exhibits" was insufficient).

Apple objects to each and every document in plaintiff's "Group Exhibit." First, Apple objects to these documents on the grounds that none of them are authenticated pursuant to Fed. R. Evid. 901 or 902. Second, Apple objects to these documents on the grounds that they are inadmissible hearsay and the attributed statements within them are double-hearsay. Finally, Apple objects to these documents on the grounds that they are not relevant pursuant to Fed. R. Evid. 802 because they do not contain *any* information concerning the purchase date of plaintiff's iPhone(s). Therefore, nothing in the cited exhibit contains contradictory evidence.

Exhibit H: This exhibit is Apple's entire set of responses to plaintiff's special interrogatories. Plaintiff has pointed to no specific response as required. Therefore, this

entire exhibit should be disregarded. *See Ammons v. Aramark Unif. Servs.*, 368 F.3d 809, 817 (7th Cir. 2004) (explaining that non-moving party must include specific references, not citations to entire depositions or entire exhibits). This exhibit is irrelevant pursuant to Fed. R. Evid. 402 because Apple's interrogatory responses do not contain *any* information regarding plaintiff's purchase date. Therefore, nothing in the cited exhibit contains contradictory evidence.

Exhibit I: Apple objects to this e-mail chain to the extent that it contains inadmissible hearsay pursuant to Fed. R. Evid. 802, specifically the embedded e-mail from Daniel Frommer to Jennifer Bowcock and Jennifer Hakes. Apple also objects that this exhibit is irrelevant under Fed. R. Evid. 402 because it does not contain *any* information regarding plaintiff's purchase date. Therefore, nothing in this exhibit contains competent contradictory evidence.

Exhibit J: Apple objects that this exhibit is irrelevant under Fed. R. Evid. 402 because it does not contain *any* information regarding plaintiff's purchase date. Therefore, nothing in this exhibit contains contradictory evidence.

Exhibit K: Apple objects to this e-mail chain to the extent that it contains inadmissible hearsay pursuant to Fed. R. Evid. 802, specifically the embedded e-mail from Carol Hernandez to Jennifer Hakes if this e-mail is offered to prove the existence of an inquiry from Michelle Kessler at USA Today. Apple also objects that this exhibit is irrelevant under Fed. R. Evid. 402 because it does not contain *any* information regarding plaintiff's purchase date. Therefore, nothing in this exhibit contains competent contradictory evidence.

Exhibit L: Apple objects to this e-mail on the grounds that is not relevant pursuant to Fed. R. Evid. 402 because it does not contain *any* information regarding plaintiff's purchase date. Therefore, nothing in this exhibit contains competent contradictory evidence.

Exhibit M: This exhibit is Lance Kunnuth's Declaration. Plaintiff has pointed to no specific paragraph(s) as required. Therefore, this entire exhibit should be disregarded. *See Ammons*, 368 F.3d at 817. Apple also objects that this exhibit is irrelevant under Fed. R. Evid. 402 because it does not contain *any* information regarding plaintiff's purchase date. Therefore, nothing in this exhibit contains competent contradictory evidence.

Thus, plaintiff has presented no contradictory evidence and this fact remains undisputed.

48. Apple has no record of any battery-related complaints or requests for repair concerning the Plaintiff's iPhone. (Knuth Decl. ¶ 5.)

PLAINTIFF'S RESPONSE: Paragraph 5 of the Knuth Declaration is as stated in Paragraph 48 above. However, Plaintiff states that in its Response to Interrogatories, attached hereto as Exhibit H, Defendant also claimed to "have no record" of the voluminous press and media inquiries, as well as consumer advocacy group complaints, regarding its Battery Replacement Program, which Group Exhibit A, and Exhibits H-M of Plaintiff's Response to Defendant's Motion for Summary Judgment show is clearly untrue.

APPLE'S REPLY: None of the cited exhibits contain competent contradictory evidence; therefore, this fact remains undisputed.

Group Exhibit A: This "Group Exhibit" is not authorized by the governing rules and fails to satisfy plaintiff's burden of coming forward with specific facts. *See Smith v. Lamz,* 321 F.3d 680, 683 (7th Cir. 2003) (affirming summary judgment for defendant because plaintiff's attempt "to support his factual disagreements by affixing to his brief assorted material" was insufficient); *Brasic v. Heinemann's Inc.,* 121 F.3d 281, 285 (7th Cir. 1997) (explaining that Rule 56 requires specific references to affidavits and parts of the record; therefore, plaintiff's reference to "see all exhibits" was insufficient).

Apple objects to each and every document in plaintiff's "Group Exhibit." First, Apple objects to these documents on the grounds that none of them are authenticated pursuant to Fed. R. Evid. 901 or 902. Second, Apple objects to these documents on the grounds that they are inadmissible hearsay and the attributed statements within them are double-hearsay. Finally, Apple objects to these documents on the grounds that they are not relevant pursuant to Fed. R. Evid. 802 because they do not contain *any* information concerning a complaint or repair request made by plaintiff regarding his iPhone(s). Therefore, nothing in the cited exhibit contains contradictory evidence.

Exhibit H: This exhibit is Apple's entire set of responses to plaintiff's special interrogatories. Plaintiff has pointed to no specific response as required. Therefore, this entire exhibit should be disregarded. *See Ammons v. Aramark Unif. Servs.,* 368 F.3d 809, 817 (7th Cir. 2004) (explaining that non-moving party must include specific references, not

citations to entire depositions or entire exhibits). This exhibit is irrelevant pursuant to Fed. R. Evid. 402 because Apple's interrogatory responses do not contain *any* information regarding any complaints or repair requests made by plaintiff to Apple. Therefore, nothing in the cited exhibit contains contradictory evidence.

Exhibit I: Apple objects to this e-mail chain to the extent that it contains inadmissible hearsay pursuant to Fed. R. Evid. 802, specifically the embedded e-mail from Daniel Frommer to Jennifer Bowcock and Jennifer Hakes. Apple also objects that this exhibit is irrelevant under Fed. R. Evid. 402 because it does not contain *any* information regarding any complaints or repair requests made by plaintiff to Apple. Therefore, nothing in this exhibit contains competent contradictory evidence.

Exhibit J: Apple objects that this exhibit is irrelevant under Fed. R. Evid. 402 because it does not contain *any* information regarding any complaints or repair requests made by plaintiff to Apple. Therefore, nothing in this exhibit contains contradictory evidence.

Exhibit K: Apple objects to this e-mail chain to the extent that it contains inadmissible hearsay pursuant to Fed. R. Evid. 802, specifically the embedded e-mail from Carol Hernandez to Jennifer Hakes if this e-mail is offered to prove the existence of an inquiry from Michelle Kessler at USA Today. Apple also objects that this exhibit is irrelevant under Fed. R. Evid. 402 because it does not contain *any* information regarding any complaints or repair requests made by plaintiff to Apple. Therefore, nothing in this exhibit contains competent contradictory evidence.

Exhibit L: Apple objects to this e-mail on the grounds that is not relevant pursuant to Fed. R. Evid. 402 because it does not contain *any* information regarding any complaints or repair requests made by plaintiff to Apple. Therefore, nothing in this exhibit contains competent contradictory evidence.

Exhibit M: This exhibit is Lance Kunnuth's Declaration. Plaintiff has pointed to no specific paragraph(s) as required. Therefore, this entire exhibit should be disregarded. *See Ammons*, 368 F.3d at 817. Apple also objects that this exhibit is irrelevant under Fed. R. Evid. 402 because it does not contain *any* information regarding any complaints or repair requests made by plaintiff to Apple. Therefore, nothing in this exhibit contains competent contradictory evidence.

Thus, plaintiff has presented no contradictory evidence and this fact remains undisputed.

Dated: July 25, 2008

Respectfully submitted,

APPLE INC.

By: ______/s/ Patrick T. Stanton__________

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